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In The

Supreme Court of the United States

OCTOBER TERM, 1998

OLGA ORISEK,

Petitioner,

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner respectfully presents the following questions which are of national importance in today's economic climate of corporate "downsizing":

Whether an employee, discharged together with other employees who were discharged by the employer because of "downsizing", can successfully make a case of discrimination under TITLE VII and ADEA, and

whether the employer's defense of "downsizing" its operations summarily overrides, as demonstrated in this petitioner's case by the decisions of the courts below, the evidence of discriminatory treatment furnished by the discharged employee under the *McDonnell Douglas* framework prescribed by the Supreme Court, that is to say,

whether, after the discharged employee established her *prima facie* case, the employer's rebuttal, in which the employer proffered the "downsizing" its operations, the alleged specific elimination of the employee's position and the employee's alleged unsatisfactory performance as non-discriminatory reasons for its employment action, will always prevail,

even though the discharged employee in her rebuttal of the employer's non-discriminatory reasons furnished, according to the *McDonnell Douglas* doctrine and proof pattern, overwhelming circumstantial evidence showing that the employer's proffered explanation, as it pertains specifically to this employee's case, is unworthy of credence and was therefore a sham to hide the true discriminatory reasons, and, therefore,

whether the TITLE VII and ADEA statutes are irreparably undermined by such decisions of the courts below.

PARTIES TO THE PROCEEDING BELOW

The parties before this Court are those set forth in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Olga Orisek, petitioner pro se, respectfully petitions for certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in *Olga Orisek v. American Institute of Aeronautics and Astronautics.*

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated September 3, 1996, in *Orisek v. American Institute of Aeronautics and Astronautics* is reported at 938 F. Supp. 185, 189 (S.D.N.Y. 1996) and is reprinted in Appendix A at 2a-17a. The order to that effect, filed September 4, 1996, is reprinted in Appendix A at 1a.

The opinion and summary order of the United States Court of Appeals for the Second Circuit, filed September 3, 1998, is reprinted in Appendix B at 18a-21a and is unpublished.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

As the date on which the United States Court of Appeals decided this case was September 3, 1998, this petition is timely filed. No petition for rehearing was filed in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Age Discrimination in Employment Act of 1967, as codified, 29 U.S.C. § 621 - 634 (amended in 1984, 1990, and

by the *Age Discrimination in Employment Amendments of 1986*, Pub. L. No. 99 - 592).

Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. § 2000e to 2000e-17 (amended in 1972, 1978, and by the *Civil Rights Act of 1991*, Pub. L. No. 102 - 166, race, color, gender, religion, national origin).

STATEMENT OF THE CASE

The petitioner, Olga Orisek, alleges that the respondent, American Institute of Aeronautics and Astronautics (AIAA), committed acts of unlawful discrimination based on age, gender and national origin of Orisek when AIAA refused to hire Orisek for the position of Library Manager in May 1991 and when AIAA discharged Orisek almost two years later, in March 1993.

This action for discrimination in employment was initiated in November 1995 following an investigation by EEOC and the issuance of the Notice of the Right to Sue in September 1995. The discovery was completed in mid-1996.

AIAA proffered two principal reasons for Orisek's discharge: The first reason was the alleged elimination of Orisek's position, the position of Operations Computer Support Analyst, that allegedly resulted from a business-justified, Institute-wide reduction in its work force. The second reason was Orisek's alleged unsatisfactory job performance.

Subsequently, the United States District Court for Southern District of New York granted a motion for summary judgment for the defendant. The opinion and the order, entered on September 4, 1996, are reprinted in Appendix A (1a-17a).

The appeal was filed in a timely manner on September 23, 1996. The appeal was subsequently withdrawn without prejudice to reinstatement pending a decision on the motion for reconsideration in the District Court. The motion for reconsideration was denied on August 29, 1997 and the appeal was reinstated on September 25, 1997. (The District Court's one-sentence, handwritten denial is not included here.)

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court in September 1998. The summary order was entered on September 3, 1998 and is reprinted in Appendix B (18a-21a).

Orisek presented the following issues for the review by the Court of Appeals: In its decision and order of summary judgment, the District Court made significant and multiple errors in the interpretation of the law as well as in the interpretation of the available evidence. The following errors have been sufficiently important so that the District Court reached an incorrect decision as a result of these errors:

1. The Court abused its discretion when it denied Orisek's request seeking information about the circumstances under which certain employees protected under TITLE VII and ADEA statutes left AIAA's employ.

2. The Court went awry in interpreting the prima facie case and the shifting of the evidentiary burden under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 5 FEP 965 (1973), doctrine and proof pattern specified by the Supreme Court for TITLE VII and ADEA cases.

3. The Court erroneously failed to apply the *McDonnell Douglas* test, prescribed by the Supreme Court for TITLE VII and ADEA cases, to the matter of AIAA's refusal to hire Orisek for the position of Library Manager in May 1991.

4. In the matter of the Orisek's discharge by AIAA in May 1993, the Court's refusal to rule on the sufficiency of Orisek's prima facie case notwithstanding, the plaintiff submitted overwhelming circumstantial evidence that sufficiently establishes her prima facie case; just on these grounds, the Court's decision to grant the summary judgment for AIAA is erroneous and should have been reversed as a matter of law.

5. Orisek furnished overwhelming circumstantial evidence, as envisioned by the *McDonnell Douglas* doctrine and proof pattern, showing that AIAA's proffered explanation, as it pertains specifically to Orisek's case, is unworthy of credence and was therefore a sham to hide the true impermissible discriminatory reasons. Orisek showing includes, but is not limited to the following facts:

(i) The first instance of discrimination, the refusal to hire Orisek for the position of the Library Manager, took place twenty two months before the alleged "downsizing".

(ii) Orisek showed that less than one month before Orisek's discharge and the alleged elimination of Orisek's position of Operations Computer Support Analyst, AIAA stated in Orisek's job performance review: "The role as Operations Computer Support Analyst is critical for TID's future"...."Olga, as our Systems Guru"...."this is a critical position within TID".

(iii) Orisek showed that AIAA made an unsuccessful attempt to replace Orisek with an employee from a class of employees not protected under TITLE VII and ADEA.

(iv) Orisek showed that her performance was rated "excellent" (the highest rating) by AIAA for fifteen years, the last six years in the same position - Operations Computer Support Analyst.

(v) AIAA alleged that during the ensuing two years in the same position, Orisek's performance declined by four levels from "excellent" (the highest) to "unsatisfactory" (the lowest).

(vi) AIAA gave Orisek no performance reviews or warnings during the last two years, thus demonstrating a disparate treatment of Orisek in comparison to all other employees whose performance was reviewed regularly on an annual basis.

(vii) Orisek showed that AIAA furnished into evidence a fraudulent job description in its attempt to claim that Orisek's duties had changed and, therefore, that Orisek was not performing her duties as required.

(viii) Orisek furnished a statistical analysis of the AIAA's data, showing, according to the standards prescribed by the Supreme Court, that AIAA systematically discriminated against management employees protected under TITLE VII and ADEA.

All of the above issues are discussed in a more appropriate detail in the Appellant's Brief reprinted in Appendix C (22a-105a) and in the mathematical statistics analysis of AIAA's employment practices reprinted in Appendix D (106a-130a).

REASONS FOR GRANTING THE WRIT

The questions presented for review encompass issues of overwhelming national importance. The American business climate over the last two decades has been characterized by "downsizing", particularly by large companies, in a largely successful attempt to improve their competitiveness. This trend continues in spite of the country's favorable economic conditions.

Under these circumstances, the employers, while pursuing their legitimate business interests, must not be allowed to hide their prejudices and impermissible discriminatory acts under the mantle of "downsizing".

This is a matter of great significance and interest to the citizens of this country. A New York Times article entitled "When Being An Old Hand Becomes A Handicap", which appeared on March 31, 1993, describes several cases of people who were laid off. The article refers to

> "an older worker who traditionally received high job-performance ratings, then begins to get "fair" or "poor" evaluations and finally is discharged, a long-time employee who is no longer invited to staff meetings, the worker who has responsibilities taken away, or an older employee who is transferred to a division where there are likely to be layoffs".

It is striking how closely this newspaper description parallels this petitioner's case, word by word.

Similarly, the magazine The Economist wrote on page 7 of its January 27, 1996 issue:

> "Yet in reviewing the legislation (i.e. ADEA), the American Congress concluded that age discrimination remains an obstacle to employment for older workers, and that 'statutory provisions.....remain incomplete and somewhat ineffective'. Opinion surveys show that 80% of Americans - the same proportion as in Europe - believe that most employers discriminate against older workers. Legislation may merely have made employers more careful to hide their prejudices."

If the employers are allowed to hide their prejudices and impermissible discriminatory acts under the guise of "downsizing" even after confronted with overwhelming circumstantial evidence of their discriminatory actions, the circumstantial evidence specifically envisioned and permitted by the Supreme Court under the *McDonnell Douglas* doctrine and proof pattern, then the TITLE VII and ADEA statutes are unenforceable.

Unfortunately, the sentiment conveyed by the courts below in this petitioner's case confirms just that. For instance, the sole substantive question asked by the appellate panel during the hearing and directed only at the appellee was exactly the following: "There were several layoffs, right?"

This petitioner pro se cannot help herself but to express her disappointment with the cavalier way in which the courts below treated the law and the evidence. Because of the undisputed layoffs, it is as if the courts below did not want to bother with the overwhelming circumstantial evidence of the employer's discriminatory actions. Furthermore, as discussed below, the courts appeared to lack the understanding of the *McDonnell Douglas* doctrine and proof pattern prescribed by the Supreme Court.

Similarly, the District Court in its decision (Appendix A at 7a) quotes *Viola v. Philips Medical Systems (PMSNA)*, 42 F.3d 712, 715-16 (2nd Cir. 1994):

> "Given the minimal requirements for establishing a *prima facie* case of employment discrimination, and the ease with which employers can point to the down-sizing procedure to justify any single termination, these cases (involving individual employee caught up in a reduction-in-force) often turn on whether a plaintiff has established that the rationale offered was a mere pretext for.....discrimination."

Unhappily, the immediately preceding sentence (Appendix A at 7a) of the District Court decision states:

> "I need not reach the question of whether this showing is sufficient to establish a *prima facie* case, however, because I find that, even assuming her circumstantial evidence meets the threshold of sufficiency, she has failed to proffer evidence from

> which a reasonable jury could find that the Institute's asserted reason for the discharge was a pretext for discrimination."

Thus, the District Court refused to rule on the sufficiency of Orisek's prima facie case, which AIAA claimed (Appendix A at 6a) Orisek could not establish. As much as "assuming her circumstantial evidence meets the threshold of sufficiency" does not constitute a ruling on the sufficiency of Orisek's *prima facie* case, the District Court's erroneous refusal to rule on the sufficiency of Orisek's *prima facie* case is of great legal significance in view of the *McDonnell Douglas* doctrine.

Here, the District Court went awry in interpreting the *prima facie* case and the shifting of the evidentiary burden under the *McDonnell Douglas* doctrine and proof pattern. The Supreme Court clarified this matter in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 25 FEP 113, 115 (1981):

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now emerges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly, by persuading the court that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence".

It should have been clear to the District Court that Orisek undertook to do the latter. This matter is discussed in a more appropriate detail in Appendix C at 40a-48a.

Surprisingly then, the Appellate Court erroneously claims

in its decision (Appendix B at 20a) that Orisek was not denied by the District Court the opportunity to establish her *prima facie* case and advances the idea of equating "assuming her circumstantial evidence meets the threshold of sufficiency (of her *prima facie* case)" with the non-existent ruling by the District Court on the sufficiency of Orisek's *prima facie* case. (This erroneous idea was proposed for the first time by AIAA in its reply to Orisek's appellate brief.)

Since, however, the Appellate Court concluded in its decision that the District Court found that Orisek has established her *prima facie* case, then the Appellate Court, by affirming the District Court's summary judgment in favor of AIAA, is in conflict with its earlier decision in the matter of *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2nd Cir. 1990):

> "Because employers rarely have a paper trail - or 'smoking gun' - attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most completely and appropriately made by the trier of the fact. So long as the plaintiff can present 'solid circumstantial evidence' supporting his case, he should have the opportunity to prove his case at trial."

The summary of what constitutes the sufficient circumstantial evidence under the *McDonnell Douglas* according to the previous court decisions can be found in Appendix C at 40a-48a.

This petitioner, Orisek, contends that, according to the standards established by the Supreme Court in *McDonnell Douglas* as well as in view of the court decisions summarized

in Appendix C at 40a-48a, she sufficiently established her *prima facie* case, furnished sufficient circumstantial evidence of AIAA's discriminatory actions and furnished a rebuttal of AIAA's proffered non-discriminatory reasons beyond pale and that, therefore, the decision of the Court of Appeals is in conflict both with its earlier decision in *Hollander* and with the framework established by the Supreme Court for TITLE VII and ADEA cases.

Orisek is a 62 year old woman of foreign national origin who was in AIAA's employ for 17 years. For 15 years, including the last 6 years in the same position - Operations Computer Support Analyst - AIAA judged Orisek's job performance as excellent (the highest rating). During that time, Orisek received regular annual salary increases and was promoted several times.

In May 1991, the month of Orisek's last excellent annual job performance review when Orisek also received her last merit salary increase, Orisek applied for the advertised position of AIAA Library Manager and was rejected by AIAA. During Orisek's tenure with AIAA, she previously successfully worked as Assistant Librarian, supervising the AIAA library during the long illness of the Librarian who was also the Library Manager.

Orisek furnished evidence showing that AIAA hired a 33 year old American male (Appendix C at 50a-51a) as Library Manager, an applicant from a class of employees not protected under TITLE VII and ADEA who did not respond to the advertised job vacancy but was invited for an interview by AIAA, an applicant with only five years of experience, a limited knowledge of AIAA literature and operations, and a limited knowledge of languages and computer applications - all qualifications that were required by the published job vacancy notice. The evidence further shows that AIAA's testimony in

this matter is not worthy of credence (Appendix C at 55a-63a), that Orisek was better qualified than the chosen applicant and that AIAA purposely "relaxed" the requirements of the position in order to hire the less qualified applicant (Appendix C at 64a-69a).

See *Wilburn v. Dial Corp.*, 724 F. Supp. 530, 51 FEP 744 (W.D. Tenn. 1989): "The plaintiff was subject to disparate treatment when the defendant "relaxed" the educational qualifications to promote the white male."

See also *Greer v. University of Arkansas Board of Trustees*, 544 F. Supp. 1085, 33 FEP 77 (E.D. Ark. 1982), *aff'd in pertinent part sub nom. Behlar v. Smith*, 719 F.2d 950, 33 FEP 92 (8th Cir. 1983), *cert. denied*, 466 U.S. 958, 104 S. Ct. 2169, 80 L. Ed. 2d 552, 34 FEP 1096 (1984):

> "The named plaintiff, a tenured professor in the Physical Education department at defendant university, was rejected in her bid for the department chairmanship in favor of a male candidate. The candidate had been chosen even before the existence of a vacancy had been publicized, and he lacked previous experience heading other departments of physical education - the same qualification that plaintiff had been told was the reason she had not been selected. His other qualifications were suspect as well, the principal reason for his having been hired having been that 'he had gone to a high school in California with two swimming pools, that he could probably teach swimming and that he had a nationwide breadth of experience'. The district court found that, because of the contrast between plaintiff's qualifications and those of the individual chosen for chairmanship, plaintiff has been a victim of sex discrimination, and it directed the Board to consider

her and other qualified candidates for the vacancy since created."

As an example (Appendix C at 55a), AIAA engaged in such unsavory deception as submitting into evidence a 15 year old resume of Orisek in an attempt to detract from Orisek's qualification. This resume, which naturally did not include the record of the ensuing 15 years of experience in the AIAA's organization, was written by Orisek by hand in a refugee camp in Europe and was submitted to AIAA with Orisek's application for employment 15 years earlier.

The final reason for granting this petition in connection with the events of May 1991 is the fact that the District Court in its decision (Appendix A at 1a-17a) failed to apply the *McDonnell Douglas* test, prescribed by the Supreme Court, to the matter of Orisek's application for the position of Library Manager. Instead, the District Court engaged in a disjointed discussion of this matter throughout its decision (Appendix A at 1a-17a). The Court of Appeals erroneously concurred (Appendix B at 18a-21a).

But there is more. After Orisek complained for the record (Appendix C at 60a) about the way she was treated by AIAA in connection with her application for the position of Library Manager in May 1991, AIAA immediately retaliated against Orisek. AIAA's actions included the transfer of Orisek, a Computer Operations Support Analyst responsible for AIAA computer-based production system ("our Systems Guru" writes AIAA in Orisek's job performance evaluation as late as February 1993), into a Marketing Department (Appendix C at 84a) that had nothing to do with Orisek's responsibilities, AIAA stopped inviting Orisek to the regular meetings of the management group and excluded Orisek from committees pertaining to computer applications which created many

production problems (Appendix C at 87a).

This is how the sham, that culminated in Orisek's February 1993 unsatisfactory job performance review and Orisek's discharge in March 1993, started in May 1991. Furthermore, AIAA started claiming in its affidavits (Appendix C at 60a-61a) after Orisek started this action, that as early as June 1991, Orisek was taken to task by her supervisor for previously not completing projects on time and not following company procedures. That is to say, after a 15 years long string of excellent annual job performance reviews by AIAA, AIAA claims falsely, after Orisek started this action, that only one month after Orisek's last excellent job performance review Orisek displayed significant deficiencies in her performance both at the time and before her last excellent job performance review. This preposterous claim is refuted by the evidence (Appendix C at 61a-62a).

During the following two years, AIAA gave Orisek no performance reviews or warnings (Appendix C at 71a-73a). This represents a direct evidence of disparate treatment of Orisek by AIAA because other evidence shows that all other employees' performance was reviewed regularly on an annual basis (Appendix C at 72a). The Supreme Court has ruled that the direct evidence of disparate treatment, if strong enough, makes the *McDonnell Douglas* test inapplicable (*Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed.. 2d 523, 36 FEP 977 (1985)) and results in a direct verdict for the plaintiff.

At the end of the two year period in February 1993, Orisek received an unsatisfactory (the lowest rating, four levels below excellent) performance review. Orisek promptly complained about what Orisek perceived to be a general atmosphere of discrimination in the AIAA's organization

against older, foreign-born women. The changes in the composition of the AIAA management employee group after June 1991 (Appendix C at 39a) cannot be characterized in any way other than "American male youth" movement. Orisek complained in a letter to AIAA, dated February 10, 1993, reprinted in Appendix E at 131a-134a. AIAA never discussed this letter with Orisek and proceeded with discharging Orisek three weeks later.

Only after Orisek started this action, AIAA claims in its affidavits that AIAA did not review Orisek's performance for almost two years in order to give Orisek an opportunity to improve. Here, AIAA appears to be falling into its own trap and confirms its disparate treatment of Orisek: By not reviewing Orisek's performance nor giving her a performance warning, AIAA denied Orisek the opportunity to improve (assuming that such improvement was necessary as AIAA started claiming only in February 1993). The evidence shows that such opportunity was given to all other employees either through annual performance reviews or through performance warnings (Appendix C at 72a). See *Vaughn v. Edel,* 918 F.2d 517, 54 FEP 870 (5th Cir. 1990):

> "Neither criticizing Vaughn when her work was unsatisfactory nor counseling her how to improve, Texaco treated Vaughn differently than it did its other contract analysts because, as the magistrate found, she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees."

Among other questionable actions and statements detailed in various portions of Appendix C (22a-105a), AIAA submitted into evidence a fraudulent job description (Appendix C at 83a) in an attempt to show that Orisek's duties had

changed and, therefore, that Orisek was not performing her duties as required. AIAA certified in response to Orisek's interrogatories that said job description, which later turned out to be plainly fraudulent, was used for evaluating Orisek's performance.

Similarly, AIAA cited as one reason for Orisek's unsatisfactory performance Orisek's reliance on an outside contractor - computer programmer. However, the evidence shows that AIAA started this practice in 1982, long before Orisek's appointment to the position of Operations Computer Support Analyst, and has continued this practice to this day, several years after Orisek's discharge (Appendix C at 88a).

In the meantime, the evidence shows that Orisek had significant work accomplishments between May 1991 and February 1993. Among them are (1) Orisek's proposal and implementation of a significant operational improvement which involved a computer automation of microfiche labels with actual realized annual savings of $40,000 to AIAA (Appendix C at 87a-88a), (2) Orisek's proposal and implementation of an optical scanning system which resulted in an almost 40 percent improvement in productivity according to AIAA (Appendix C at 87a-88a), and (3) Orisek's resolution of a well publicized RECON connection with NASA in December 1992 (Appendix C at 67a-68a and 87a-88a), three months before Orisek's discharge.

So much for Orisek's alleged unsatisfactory performance - the first reason proffered by AIAA as a non-discriminatory reason for Orisek's discharge.

The second reason proffered by AIAA for Orisek's discharge - the alleged elimination of Orisek's position - is not credible for the following reasons:

While the layoffs for budgetary reasons are not in dispute, the evidence shows that AIAA's need for an Operations Computer Support Analyst continued after Orisek's discharge and AIAA replaced Orisek with somebody else immediately after Orisek's discharge (Appendix C at 81a-82a). Orisek was the only Operations Computer Support Analyst in the AIAA's organization that relies heavily on the use of computer technology. Among other things, Orisek, in conjunction with an outside programming consultant, designed and implemented the AIAA computerized production system in 1987. This computerized production system was vital to the functioning of the AIAA organization and Orisek was in charge of the system maintenance and the implementation of improvements until she was terminated in March 1993.

The evidence shows that only three weeks before Orisek's discharge, AIAA stated in Orisek's job performance review: "[her] role is critical for TID's future"....."Olga, as our Systems Guru"....."this is a critical position within TID" (Appendix C at 81a).

The evidence further shows that AIAA made an unsuccessful attempt to replace Orisek with a forty-five year old male, who was introduced by AIAA to the outside programming consultant as "a new system analyst that somebody hired" (Appendix C at 82a). In addition, the evidence shows that Orisek was replaced permanently with a forty-seven year old male as a contact with the outside programming consultant (Appendix C at 82a).

Furthermore, the District Court erred in concluding that the statistical data regarding AIAA's employment practices is not statistically significant (Appendix A at 15a). A mathematical statistics analysis presented by Orisek and

reprinted in Appendix D at 106a-130a defeats this District Court's conclusion and shows that the data is statistically significant at the 94 percent and 97 percent level of confidence (Appendix D at 109a-128a and Appendix C at 89a-97a).

In addition, the evidence shows that the data on AIAA's employment practices with respect to AIAA's management employees, presented by Orisek in Appendix C at 36a-40a, is relevant to Orisek's case (Appendix C at 38a). It is so because Orisek applied for the position of Library Manager, a management position, and was rejected by AIAA. Previously, Orisek worked in a management position as AIAA's department head and was promoted to the position of Computer Operations Support Analyst. The data on AIAA's employment practices regarding its management employees is therefore highly relevant to Orisek's case. The District Court erroneously claims (Appendix A at 16a) that Orisek did not submit evidence that these employees "are appropriately grouped as management" and were "similarly situated". As discussed below, the same District Court denied Orisek's request seeking additional information in this matter after AIAA refused to provide such information.

The mathematical statistics analysis in Appendix D (109a-128a) was prepared according to the standards set by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), *Hazelwood School District v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768, 15 FEP 1 (1977) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 396, 14 FEP 1514 (1977).

The concept of statistical significance as related to legal significance and as adopted by the Supreme Court in *Hazelwood* and in *Castaneda* is discussed in Appendix D at

128a-130a.

Both the District Court in its handwritten denial of the motion for reconsideration (not included here) and the Court of Appeals in its opinion (Appendix B at 18a-21a) remain silent about the statistical analysis in Appendix D (109a-128a).

Nevertheless, the mathematical statistics analysis of AIAA's employment practices in Appendix D (109a-128a) shows, according to the standards prescribed by the Supreme Court, that AIAA systematically discriminated against management employees protected under TITLE VII and ADEA.

The final reason for granting this petition lies in the fact that the District Court abused its discretion when its denied Orisek's request for information regarding the circumstances under which certain management employees left AIAA's employ (Appendix C at 36a-40a). This information is clearly relevant to Orisek's case: Orisek applied for the position of Library Manager and was rejected by AIAA, worked in a management position as AIAA's department head and was promoted from the position of the department head to the position of Computer Operations Support Analyst.

The Court of Appeals, in its affirmation of the District Court's decision (Appendix B at 18a-21a), is silent about this matter. The Court of Appeals is therefore in conflict with its earlier decision in *Hollander*:

> "It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving American Cyanamid under unexplained circumstances, which might help prove his claim that American Cyanamid's explanation for his discharge was pretextual."....."we hold the district court's

denial of Hollander's motion to compel an abuse of discretion."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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